



PATENT

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**IN THE UNITED STATES PATENT AND TRADEMARK OFFICE  
BEFORE THE BOARD OF PATENT APPEALS AND INTERFERENCES**

Appellant: Rigg et al.

Serial No.: 08/110,274

Filed: August 23, 1993

FOR: METHOD AND APPARATUS FOR CUSTOMIZING FACIAL  
FOUNDATION PRODUCTS

Group: 1203

Examiner: D. Ore

Edgewater, New Jersey 07020

May 12, 1995

**BRIEF FOR APPELLANTS**

Assistant Commissioner For Patents  
Washington, D.C. 20231

Sir:

This a Brief on appellants' Appeal from the Examiner's Final Rejection  
concerning the above-identified application.



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### **I. STATUS OF CLAIMS**

Claims 12-17 and 19-21 are on Appeal.

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### **II. STATUS OF AMENDMENTS**

Claims 1-11 were cancelled without prejudice in appellants' response to a Restriction Requirement in the first Office Action. An amendment subsequent to the non-final second Office Action revised claim 12 and cancelled claim 18. No claim amendment accompanied appellants' response to the final Office Action. Accordingly, claims 12-17 and 19-21 are in the case for Appeal.

### **III. SUMMARY OF THE INVENTION**

The invention is concerned with an apparatus for customizing a facial foundation product at the point of sale to a customer. In this category of product, a customer's chief concern is to find an optimal color match with her skin shade.

Three essential elements are necessary for the claimed apparatus. These are a skin analyzer for reading skin properties, a programmable device receiving the reading and correlating same with an optimal formula, and a formulation machine for preparing the facial foundation product from variously colored chemical compositions. The formulation machine receives instructions from the programmable device on the optimal formula. This formula is then dosed and blended from a series of dispensers containing separate cosmetic chemical compositions into a receiving bottle. The optimal formula may be altered through customer preferences by manual alteration of the selected optimal formula.

A very important aspect of the invention is that the series of dispensers be at least four in number so as to contain respective dispensers of differently colored

cosmetic chemical compositions. There is a separate composition for red, yellow, black and white, these colors being monochromatic building elements that when dosed in the proper ratio to the receiving bottle will achieve the optimal shade for that particular customer.

Accordingly, claim 12 recites an apparatus for customizing a facial foundation product at point of sale to a customer, including: (i) a mechanism **2** for measuring a customer's natural skin and for generating a signal conveying information on the measured natural skin coloration; (ii) a programmable device **6** for receiving the signal and correlating same with an optimal formula; and (iii) a formulation machine **10** for preparing the facial foundation product. The formulation machine includes: (a) a mechanism **12** for receiving the optimal formula as a set of operating instructions; (b) at least four dispensers each containing a differently colored cosmetic chemical composition respectively being red **16**, yellow **18**, black **20** and white **22**; (c) a mechanism **14** for activating dosing to a common dosing chamber **26** of certain of the cosmetic chemical compositions at certain concentrations as determined by the operating instructions; and (d) a mechanism **24** for delivering the dosed formula into a container to the customer as a facial foundation product **32**.

Claim 13 specifies that the mechanism **2** for measuring coloration can also measure at least one skin characteristic selected from moisturization, oiliness, texture and irritation sensitivity.

Claim 14 specifies that the mechanism **2** for measuring coloration is a spectrophotometer. Claim 15 indicates the spectrophotometer is formed with at least one light-emitting diode. Claims 16 and 17 specify that the spectrophotometer measures visible and infrared wavelength light, respectively, which interacts with the skin.

Claim 19 further recites a mechanism **36** for the customer to input a modification to the signal generated by the measuring mechanism.

Claim 20 further specifies the presence of a mechanism **34** to mark with an identification mark each customized facial foundation product and a mechanism for storing a record of the mark within the programmable device **6** so as to permanently identify with the customer the identification mark. Claim 21 elucidates the identification mark as being a bar code.

#### **IV. ISSUES ON APPEAL**

Are claims 12-17 and 19-21 obvious under 35 U.S.C. § 103 over Klein et al. (U.S. Patent 5,163,010) in view of Krauss et al. (U.S. Patent 4,871,262) and Erdtmann (DE 41 10 299)?

#### **V. GROUPING OF THE CLAIMS**

The Board is requested to consider separately the following two groups of claims. Group I includes claims 12-17 and 19 focusing generally on the apparatus and with specific emphasis on the differently colored cosmetic compositions. Group II includes claims 20-21 focusing on a mechanism to mark with an identification mark each customized facial foundation product and a mechanism for storing a record of the mark within the programmable device so as to permanently identify with the customer the identification mark. Bar codes are introduced within claim 21 as a preferred embodiment of the identification mark.

## **VI. APPELLANTS' ARGUMENT**

***Are claims 12-17 and 19-21 obvious under 35 U.S.C. § 103 over Klein et al. (U.S. Patent 5,163,010) in view of Krauss et al. (U.S. Patent 4,871,262) and Erdtmann (DE 41 10 299)?***

The claimed apparatus of the present invention is focused on the customizing of a facial foundation product at point of sale to a customer. Essential to the invention is a formulation machine with at least four dispensers each containing a differently colored cosmetic chemical composition. More specifically, each of the cosmetic chemical compositions are respectively red, yellow, black and white in color. By programmed dosing of combinations of these colored chemical compositions, the perfect skin matched facial foundation product is provided to the customer at point of sale.

Klein et al. (U.S. Patent 5,163,010) discloses an apparatus for formulating a custom mixed "cosmetic" product at the point of sale in response to specific input criteria. The term "cosmetic" is meant to be a hair treatment such as a permanent wave solution, hair-conditioner, shampoo, dye or other hair-treatment compounds. See column 1, lines 13-18. There is no suggestion that this disclosure would have any relevance to formulating facial foundations. The reference apparatus does not include dispensers holding differently colored compositions for formulating products of different color shades. Most especially there is no disclosure that there be four separate cosmetic chemical compositions each of a different color and being respectively red, yellow, black and white. Furthermore, the reference fails to disclose a means for measuring a customer's natural skin coloration and for generating a signal conveying information on the natural skin coloration.

The Examiner stated that the Klein et al. reference was introduced for the concept of dispensing a liquid product and of teaching four different containers.

Apparently the Examiner agrees that Klein et al. does not disclose or suggest that at least four dispensers contain differently colored cosmetic chemical compositions, being respectively red, yellow, black and white.

Krauss et al. (U.S. Patent 4,871,262) was cited as teaching the concept of mixing colors in an apparatus for blending and dispensing a cosmetic foundation product. Attention was drawn to column 7 (lines 14-34).

A variety of skin cosmetics are suggested by Krauss et al. These include facial creams, deodorants, suntan lotions and make-up formulations. See column 1, lines 9-10. The aforementioned sentence is the only one that mentions "make-up" or any other aspect of such color cosmetics. The actual focus of Krauss et al. is to supplement a base cream with skin conditioning additives to adjust for the differences in dry, oily or normal skin. See column 1 (lines 10-28).

A review of column 7 (lines 13-14) cited by the Examiner fails to find any mention of the term "pigment" or "color" or even "facial foundation". The reference clearly does not address the issue of precise color matching of a facial foundation to that of a customer's skin shade. The apparatus of Krauss et al. does not disclose the plurality of dispensers that contain the separate monochromatically colored cosmetic formulations that are respectively red, yellow, black and white.

Erdtmann (German Patent 41 10 299) was cited for disclosing an apparatus which measures skin characteristics directly on the skin of the user before the components are mixed together.

Similar to the primary references, Erdtmann does not focus upon the problem of delivering a perfectly matched shade of facial foundation. Moreover, Erdtmann discloses nothing with respect to requiring four dispensers each with a respective red, yellow, black and white colored cosmetic chemical composition.

A combination of Klein et al. in view of Krauss et al. and Erdtmann would not render the instant invention obvious. Even though all the references are concerned with apparatuses that dose and blend together cosmetic components, they do not focus upon the unique difficulties of color matching of facial foundations to a customer's skin shade. There are special problems associated with perfectly matched facial foundations. These problems are neither addressed nor resolved in any of the references. Specifically, none of the references suggest that there be at least four dispensers and that each be provided with a separate cosmetic chemical composition of a different monochromatic color. Moreover, these colors must be red, yellow, black and white. Dependent upon the customer's skin color, there must be dispensed a certain volume of each of the compositions thereby creating different ratios of the red, yellow, black and white colored compositions dosed to the receiving bottle. Absent these features, the combination of references could not possibly render the claimed invention obvious. The Examiner simply has not set forth a prima facie case of obviousness.

Claim 20 specifies that the apparatus further includes a means to mark with an identification mark each customized facial foundation product. According to claim 21, the identification mark is a bar code. Thus, many thousands of customers will each have their own unique identification mark correlating to their own unique skin shade. Once measured for an optimal formula (shade), a customer need not even return to the store counter but could by mail simply order that unique shade.

While bar codes are routinely used on products, it is believed that never before has an identification mark or bar code been assigned to an individual consumer. Most often, bar codes are associated with a single product (formula) sold to a myriad of customers.

Erdtmann was cited as disclosing the labelling of the dispensed products. Applicants have been unable to identify where in Erdtmann there is disclosure to



"labelling". Present claim 20 requires a means to mark the customized facial foundation product with an identification mark. No such marking means is found in the reference. Neither is there any disclosure that the identification mark be a bar code.

## **VII. CONCLUSION**

Accordingly, appellants request The Board Of Appeals and Interferences to reverse the Examiner's rejection of the claims.

Respectfully submitted,



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## **VIII. APPENDIX**

### **Claims On Appeal**

12. An apparatus for customizing a facial foundation product at point of sale to a customer, comprising:

(i) a means for measuring a customer's natural skin coloration and for generating a signal conveying information on the measured natural skin coloration;

(ii) a programmable means for receiving the signal and for correlating the signal with an optimal formula; and

(iii) a formulation machine for preparing the facial foundation product comprising:

(a) a means for receiving the optimal formula as a set of operating instructions;

(b) at least four dispensers each containing a differently colored cosmetic chemical composition, the cosmetic chemical compositions being colored respectively red, yellow, black and white;

(c) a means for activating dosing to a common dosing chamber of certain of the cosmetic chemical compositions and at certain concentrations as determined by the operating instructions; and

(d) a means for delivering the dosed formula into a container to the customer as a facial foundation product.

13. The apparatus according to claim 12 wherein the means for measuring coloration can also measure at least one skin characteristic selected from the group consisting of the customer's natural skin moisturization, oiliness, texture and irritation sensitivity.

14. The apparatus according to claim 12 wherein the means for measuring is a spectrophotometer.

15. The apparatus according to claim 14 wherein the spectrophotometer is formed with at least one light-emitting diode.

16. The apparatus according to claim 15 wherein the spectrophotometer measures visible wavelength light which interacts with the skin.

17. The apparatus according to claim 15 wherein the spectrophotometer measures infrared wavelength light which interacts with the skin.

19. The apparatus according to claim 12 further comprising a means for the customer to input a modification to the signal generated by the measuring means.

20. The apparatus according to claim 12 further comprising a means to mark with an identification mark each customized facial foundation product and a means for

storing a record of the mark within the programmable means so as to permanently identify with the customer the identification mark.

21. The apparatus according to claim 20 wherein the identification mark is a bar code.